

STATE OF MICHIGAN
COURT OF APPEALS

TAMARA S. BURKE, f/k/a TAMARA S.
MOORE,

Plaintiff-Appellant,

v

JAMES CLAIR MOORE,

Defendant-Appellant.

UNPUBLISHED
January 12, 2006

No. 256132
Iosco Circuit Court
LC No. 96-000166-DM

Before: O'Connell, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from a post-divorce trial court order granting defendant unsupervised parenting time. We vacate the order and remand for further proceedings to determine whether plaintiff received notice of the hearing on defendant's motion, and if plaintiff did not receive notice, to conduct a re-hearing with notice to plaintiff. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

After the parties' divorce, plaintiff was given sole legal and physical custody of their child. Because defendant had substance abuse issues and a criminal conviction for discharging a weapon causing injury, MCL 752.861, he was given only supervised visitation and was required to submit to urine testing before and after visitation. It appears that defendant occasionally missed scheduled supervised visits and failed drug tests.

Defendant moved for unsupervised standard parenting time on April 22, 2004. Plaintiff had subpoenaed all records and test results on defendant's urine samples for the hearing on the motion. Because the trial court was unable to receive the parties' evidence at the hearing, the hearing was adjourned. Defendant's attorney claimed that he noticed a subsequent evidentiary hearing on the motion for June 11, 2004, and filed a proof of service. However, neither plaintiff nor her attorney appeared at the hearing. Because defendant filed a proof of service of the notice for the hearing and because defendant's attorney said that he had no communication with plaintiff's attorney, the judge proceeded with the hearing. No evidence regarding defendant's drug use was offered or admitted during the hearing. Nevertheless, relying on the recommendation of an employee of the Friend of the Court, the judge signed an order the same day granting unsupervised visitation to defendant and removing the requirement of drug testing associated with defendant's parenting time.

Plaintiff's attorney claims that he did not learn of the hearing until June 16, 2004, when he received notice of the order granting unsupervised parenting time. He asked defendant's counsel to voluntarily set the order aside, but defendant's attorney refused and maintained that plaintiff's attorney actually received notice. Defendant's attorney claimed that the secretary of plaintiff's attorney had requested defendant's attorney to adjourn the hearing. Plaintiff's attorney submitted an affidavit that he did not receive notice, and his secretary submitted an affidavit that she did not have a conversation with defendant's attorney about adjourning the hearing. Plaintiff's attorney then initiated a conference call with the judge and defendant's attorney to resolve the matter. Plaintiff moved to set aside the order granting defendant unsupervised parenting time in an emergency hearing. The judge denied the informal request to revisit the case and would not hold a hearing. We granted plaintiff's emergency application for leave to appeal and stayed the order for unsupervised parenting time.

Plaintiff claims that the judge denied her due process in granting defendant unsupervised parenting without affording her notice of the hearing and the opportunity to present evidence on defendant's continuing substance abuse.

Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decision maker. The opportunity to be heard does not mean a full trial-like proceeding, but it does require a hearing to allow a party the chance to know and respond to the evidence. [*Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995) (citation omitted).]

Therefore, if plaintiff did not receive notice of the hearing, she did not have an opportunity to respond, and the circuit court denied her due process. However, the circuit court did not hear plaintiff's motion or even enter a written order denying it, so it is impossible to determine from this insufficient record whether plaintiff received notice. Therefore, we vacate the June 11, 2004 order of the circuit court and remand for a hearing to determine whether plaintiff received notice of the hearing on defendant's motion for unsupervised visitation.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Michael J. Talbot